Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CODE NO D4–28–39–1994
ABU SAMAH JC
15 AUGUST 1995

Companies and Corporations *— Winding up — Application to set aside or rescind winding-up order which has been perfected — Whether court has jurisdiction to do so — Whether provisions relating to setting aside in the Rules of the High Court 1980 applicable — Whether court can fill in the gaps left by legislature — Whether proper procedure is to appeal or to apply to stay winding-up proceedings — Rules of the High Court 1980 O 1 r 2(2) — Companies Act 1965 ss 243 & 253*

The petitioner obtained a winding-up order ('the order') against the respondent on 11 November 1994. The respondent filed a notice of motion for the setting aside and/or rescission of the order or, in the alternative, a stay of the winding-up proceedings. At the hearing of the motion, the petitioner's counsel raised a preliminary objection to the motion on the ground that the court has no jurisdiction to set aside and/or rescind the order after it had been perfected. The petitioner submitted that the respondent should have appealed against the order under s 253 of the Companies Act 1965 ('the Act'). The respondent's counsel, on the other hand, argued that since the respondent had no knowledge of the winding-up petition against it, it was an order made in default and may be set aside just as in the case of a judgment in default of appearance.

Held, upholding the petitioner's preliminary objection and dismissing the respondent's notice of motion:

(1) The Act or the Companies (Winding-Up) Rules 1972 ('the Rules') make no express provision enabling the High Court to set aside or rescind a winding-up order after it had been perfected. The scheme of the Act is such that an aggrieved party may under s 253 of the Act appeal against a winding-up order, or apply to stay the proceedings under s 243 of the Act altogether or for a limited time, under terms and conditions which the court thinks fit (see p 348G–I; *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 followed).

(2) While there are provisions in the Rules of High Court 1980 ('the RHC') which provide for the setting aside of judgments, O 1 r 2(2) of the RHC operates to exclude these provisions from applying to winding-up proceedings which are essentially governed by the Act or Rules made thereunder. As the court cannot fill in the gaps left by the legislature, the court therefore does not have the jurisdiction to set aside or rescind a perfected winding-up order (see pp 348I, 349F–H; *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 and *Vijayalaksmi Devi d/o Natchatiram v*

Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830 followed; *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725 and *City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd* [1994] 1 AMR 8:446 not followed).

[Bahasa Malaysia summary

Pempetisyen memperolehi satu perintah penggulungan ('perintah itu') terhadap penentang pada 11 November 1994. Penentang memfailkan satu notis usul untuk pengetepian dan/atau pembatalan perintah itu atau, secara pilihan, penggantungan prosiding penggulungan itu. Di pembicaraan notis usul itu, peguam pempetisyen telah mengemukakan bantahan permulaan terhadap usul itu atas sebab bahawa mahkamah tidak mempunyai bidang kuasa untuk mengetepikan dan/atau membatalkan perintah itu setelah ianya telah disempurnakan. Pempetisyen berhujah bahawa penentang sepatutnya merayu terhadap perintah itu di bawah s 253 Akta Syarikat 1965 ('Akta itu'). Peguam penentang, sebaliknya, berhujah bahawa oleh kerana penentang tidak mengetahui tentang petisyen penggulungan terhadapnya, ia adalah suatu perintah yang dibuat secara ingkar dan boleh diketepikan sama seperti dalam kes suatu penghakiman ingkar kehadiran.

Diputuskan, membenarkan bantahan permulaan pempetisyen dan menolak notis usul penentang:

(1) Akta itu atau Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah itu') tidak membuat peruntukan nyata yang membolehkan Mahkamah Tinggi mengetepikan atau membatalkan satu perintah penggulungan selepas ianya telah disempurnakan. Skim Akta itu adalah sedemikian supaya pihak terkilan boleh merayu terhadap perintah penggulungan mengikut s 253 Akta itu, atau memohon di bawah s 243 Akta itu untuk penggantunggan prosiding itu pada keseluruhannya atau untuk masa yang terhad, mengikut terma dan syarat yang mahkamah fikirkan patut (lihat ms 348G–I; *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 diikut).

(2) Sedangkan terdapat peruntukan di dalam Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang memperuntukkan untuk pengetepian penghakiman, A 1 k 2(2) KMT bertindak untuk mengetepikan peruntukan-peruntukan itu daripada dipakai dalam prosiding-prosiding penggulungan sesebuah syarikat yang sememangnya dikawal oleh Akta itu atau Kaedah-Kaedah yang dibuat di bawahnya. Oleh kerana mahkamah tidak boleh mengisi ruang kosong yang ditinggalkan oleh badan perundangan, mahkamah tidak mempunyai bidang kuasa untuk mengetepikan atau membatalkan suatu perintah penggulungan yang telah disempurnakan (lihat ms 348I, 349F–H; *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 dan *Vijayalaksmi Devi d/o Natchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ

A 830 diikut; *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725 dan *City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd* [1994] 1 AMR 8:446 tidak diikut).]

Notes

B For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors [1986] 1 CLJ 493
C
Aston Hull Coal and Brick Co Ltd, Re (1882) 45 Lt 676
Baxters Ltd, Re [1898] WN 60
Bridon New Zealand Ltd v Tent World Ltd [1992] 3 NZLR 725
City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd [1994] 1 AMR 8:451
D *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40
Intermain Properties Ltd, Re [1986] BCLC 265
Lo Siong Fong, Re [1994] 2 MLJ 72
MUI Bank Bhd v Golden Hornbill Sdn Bhd [1993] 1 MLJ 290
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39
Quicksafe Freightlines Pty Ltd v Shell Company of Australia Ltd (1985) 3 ACLC 257
E
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449
Vijayalaksmi Devi d/o Natchatiram v Jegadevan s/o Nadchatiram & Ors
F [1995] 1 MLJ 830

Legislation referred to

Companies Act 1965 ss 243(1), 253
Companies (Winding-Up) Rules 1972
G Court of Judicature Act 1964 s 24(c)
Rules of the High Court 1980 O 1 r 2(2), O 13 r 8, O 14 r 11, O 19 r 9, O 81 r 7
Companies Act 1985 s 549 [UK]
Insolvency Rules 1986 r 7.47(1) [UK]

H *P Thiagarajah* (*Rashid & Lee*) for the petitioner.
KS Narayanan (*KS Narayanan & Associates*) and *Dennis Xavier* (*Xavier, Rafie & Norhaslinda*) for the respondent.

I **Abu Samah JC**: This is a notice of motion by the respondent for an order that:

(a) the winding-up order dated 11 November 1994 be set aside and/or rescinded;

(b) all further winding-up proceedings be stayed pending the disposal of the application herein or on such other terms this honourable court deems fit; and

(c) provision be made for the cost of this motion.

At the hearing, learned counsel for the petitioner raised a preliminary objection to the motion on the ground that the court has no jurisdiction to set aside and/or rescind the winding-up order it pronounced on 11 November 1994. The court then proceeded to hear the parties on the preliminary objection first.

The petitioner's submission

Learned counsel for the petitioner submitted that the court has no jurisdiction to set aside and/or rescind the winding-up order made by this court on 11 November 1994 after it had been perfected. *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] 1 CLJ 493 was cited as authority that an order pronounced by a judge can always be withdrawn, altered or modified before it has been perfected. The judge has control over the case until his order is perfected. In the instant case, the winding-up order had been perfected and extracted and hence it could not be set aside or rescinded.

The proper course for the respondent was to appeal against the winding-up order under s 253 of the Companies Act 1965 ('the Act'): *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325. Hashim Yeop A Sani CJ in that case stated at p 326:

> It is provided quite clearly in s 253(2) of the Act that, subject to the rules, an appeal from any order or decision made or given in the winding up of a company shall lie in the same manner and subject to the same conditions as an appeal from any order or decision of the court in cases within its ordinary jurisdiction. Therefore under that provision, an appeal can be made to this court against an order for the winding up of a company.

1 *Palmer's Company Law* (24th Ed) at p 1389 states:

> The court has inherent power to rectify or rescind an order before it is drawn up .... The court can correct an order even after it has been drawn up if it does not express its intention. Apart from this an order cannot be rescinded after it has been drawn up even though it was obtained by mistake or is bad on the face of it. The court has no jurisdiction to rehear a case after the order has been perfected. Any further proceedings to discharge or vary or challenge the order must be by way of appeal or an application to stay proceedings under s 147 of the Act.

The footnote at p 443 in the *The Law of Company Liquidation* by McPherson and JO Donovan (3rd Ed) reads:

> It is improper to apply for an order rescinding the winding-up order: *Re Baxters* [1898] WN 60. Compare *Re Nicholls Pty Ltd & The Companies Act* (1982) 7 ACLR 76. As to termination or rescission of a winding-up order, see *Quicksafe Freightlines Pte Ltd v Shell Company of Australia Ltd* (1985) 3 ACLC 257 which confirms that s 383 provides only for a stay or termination of the winding up. It does not contemplate that the winding up might be rescinded or set aside.

A The powers of the court, it was submitted, are subject to ss 24 and 25 of the Courts of Judicature Act 1964 ('the CJA'). Section 24(c) of the CJA makes specific provision on the High Court's jurisdiction with respect to companies.

> s 24 Without prejudice to the generality of s 23 the civil jurisdiction of
B the High Court shall include —
>
> (c) jurisdiction under any written law relating to bankruptcy or to companies.

The Act or the Companies (Winding-Up) Rules 1972 ('the Rules') contain no provision on setting aside or rescission of a winding-up order by the
C High Court. Section 243(1) of the Act allows the court to stay a winding-up order, on the application of the liquidator or of any creditor or contributory either altogether or for a limited time on such terms and conditions as the court thinks fit but it does not make express provision enabling the court to set aside or rescind its own order.

D In *Vijayalaksmi Devi d/o Natchatiram v Jegadevan s/o Nadchatiram & Ors* [1995] 1 MLJ 830, the Court of Appeal also held at p 833 that, 'A winding-up order could not be discharged or rescinded after it had been made. The only remedy is to apply for a stay of proceedings under the winding-up order'. The effect of an order to stay proceedings under the winding-up order altogether was a total discontinuance or termination of
E the winding-up proceedings.

City Audio Sdn Bhd v Pengangkutan Kargo Udara Mas Sdn Bhd [1994] 1 AMR 8:446, it was submitted, was decided without due reference to decided cases whilst in *MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290, the issue on jurisdiction was not canvassed.

F *The respondent's submission*

Learned counsel for the respondent went at great length to emphasize that the winding-up order pronounced on 11 November 1994 was made in the absence of the respondent which had no knowledge of the winding-up petition against it. It was, therefore, a winding-up order made in default
G and was liable to be set aside just as a judgment in default of appearance which could be set aside under O 13 r 8 of the Rules of the High Court 1980 ('the RHC'), or a judgment in default of pleading which could be set aside under O 19 r 9 of the RHC. *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 was cited as authority that the court had absolute
H discretion to set aside a judgment if procedural steps were not followed and the case had not been heard on merits.

If both parties had been heard and the order had not been perfected, it was within the court's power to recall and reconsider its order. If both parties were not heard, ie due to absence of one party, then there was a
I default and a default judgment, although perfected, could be set aside by the same court without recourse to appeal.

Learned counsel for the respondent sought to distinguish the decision in *Vijayalaksmi Devi*'s case on the ground that the winding-up order in that

was made after both parties were heard. It was, therefore, not a default winding-up order. A

The High Court, it was submitted, had inherent jurisdiction to set aside a default winding-up order. In *Re Lo Siong Fong* [1994] 2 MLJ 72, the High Court noted that the court has inherent jurisdiction to strike out any abuse of its process. In *City Audio Sdn Bhd*, the High Court in Penang held that it had jurisdiction to set aside a winding-up order. B

In *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725, a case from New Zealand, the High Court of Auckland held that it had jurisdiction to rescind a winding-up order where such an order was necessary in the interests of justice. Derek French in his book on *Applications to Wind Up Companies* states: C

> The court has an inherent jurisdiction to set aside an order which it has made if the order is so fundamentally defective that it should be treated as null (*Re South African Syndicate Ltd* (1883) 28 SJ 152, in which a contributory's petition had been presented by a person who was in fact disqualified from petitioning by what is now the Insolvency Act 1986, s 124(2); *Re Blatt Ray Inc* (1939) 20 CBR 447, in which a contributory's petition had been presented by a person who was not a contributory; *Re Samoana Press Co Ltd* (1987) 4 NZCLC 64 at p 119, in which the petition had not been served on the company; in *Re KW and LM Powell Ltd* (1983) 1 NZCLC 98 at p 704, in which an application was made but there was no evidence of any miscarriage of justice calling for the exercise of the jurisdiction). Also, a fundamentally defective winding-up order may be rescinded under the power to rescind given by the Insolvency Rules 1989, r 7.47(1), which is discussed in 5.3 (*Re Calmex Ltd* [1989] 1 All ER 485). D E

In *Re Aston Hull Coal and Brick Co Ltd* (1882) 45 Lt 676, Kay J set aside a winding-up order as being analogous to a judgment obtained by default, though expressing 'considerable doubts' whether he had jurisdiction to do so. In *Bridon New Zealand Ltd v Tent World Ltd*, Thomas J held that he did have such a jurisdiction. F

The law

I am of the considered view that the Act or the Rules make no express provision enabling the High Court to set aside or rescind a winding-up order after it had been perfected. The scheme of the Act is such that an aggrieved party may under s 253 of the Act appeal against a winding-up order (see *Sri Hartamas Development Sdn Bhd*, 1 *Palmer's Company Law* (24th Ed) at p 1839), or apply to stay the proceedings under s 243 of the Act altogether or for a limited time, under terms and conditions which the court thinks fit. A stay of a winding-up proceeding altogether has the effect of a total discontinuance or termination of the winding-up proceedings. A winding-up order could not be discharged or rescinded after it has been made (see *Vijayalaksmi Devi*'s case; *Re Baxters Ltd* [1898] WN 60, *Quicksafe Freightlines Pty Ltd v Shell Company of Australia Ltd* (1985) 3 ACLC 257). There is no provision under the Act or the Rules akin to O 13 r 8, O 14 r 11, O 19 r 9, or O 81 r 7 of the RHC. Order 1 r 2(2) provides that 'These rules shall not have effect in relation to proceedings in respect of which rules have been made or may be made under any written law for the G H I

A specific purpose of such proceedings or in relation to any criminal proceedings.' Proceedings for winding up of a company are essentially governed by the Act or Rules made thereunder.

The court cannot fill in the gaps left by the legislature. In *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449, the Supreme Court said at
B p 450:

> We would in this regard also advert to the decision of the House of Lords in *Thompson v Goold & Co* [1910] AC 409, where Lord Mersey said in his speech at p 420:
>
> > 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.'
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> C
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> Even more pertinent perhaps would be the speech of Lord Loreburn LC in *Vickers, Sons and Maxim, Ltd v Evans* [1910] AC 444 when he said at p 445:
>
> > 'My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that the House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial
> D construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say ... The appellant's contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.'

E See also *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39.

The Act or the Rules made thereunder have no corresponding provision similar to r 7.47(1) of the English Insolvency Rules 1986 which provides that, 'every court having jurisdiction under the Act to wind up
F companies may review, or vary an order made by it in the exercise of that jurisdiction'. In *Re Intermain Properties Ltd* [1986] BCLC 265, the court held that it did not have jurisdiction to rescind a perfected winding-up order and the proper procedure for the petitioner was to apply on notice of motion for a stay of the winding up under s 549 of the English
G Companies Act 1985. (See also *Apirami Sdn Bhd* and *The Law of Company Liquidation* by McPherson and JO Donovan at p 443.) With respect, I am unable to follow the decision of the learned Thomas J in *Bridon New Zealand Ltd v Tent World Ltd* [1992] 3 NZLR 725 who elected, 'to review the rule and discard it on the basis that it has outlived its usefulness', even though there was no corresponding provision akin to r 7.47 of the English
H Insolvency Rules 1986.

For the above reasons, I uphold the preliminary objection by the petitioner and order that the respondent's notice of motion be dismissed with costs.

I *Preliminary objection allowed.*

Reported by CK Ong